



New England Fishery Management Council

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John Pappalardo, *Chairman* | Paul J. Howard, *Executive Director*

August 8, 2008

Alan Risenhoover, Director
Office of Sustainable Fisheries, NMFS
1315 East-West Highway, SSMC 3
Silver Spring, MD 20910

RE: MSA Environmental Review Procedures

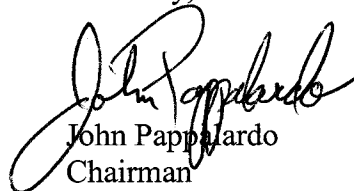
Dear Alan:

I am submitting on behalf of the New England Fishery Management Council (Council) comments on the proposed rule (*Federal Register* Vol. 73, No. 94, May 14, 2008) for MSA Environmental Review Procedures. The Council understands the reasons for the development of an alternative environmental review process as described in the proposed rule; however, the Council is concerned that the benefits of the new proposal do not outweigh the numerous uncertainties in the rule. Specifically, the loss of institutional experience gained over the last 10-12 years under the current way we do business in partnership with our Regional Office. Subjecting ourselves to more litigation through the adoption of the proposed practices that offer questionable benefit is also a concern.

Some of these proposed changes, such the integration of NEPA and MSA analysis, already are part of our current practices. In an attempt to fix some problems, the new proposed process has created new problems and burdens on the Councils. For example, it adds requirements for estimating the cost of obtaining incomplete information. NEPA has not changed as a result of the MSA reauthorization so there should be no change in the level of NEPA requirements, certainly no new requirements. An insufficient explanation is given why these and other new requirements are needed. Our Council strongly believes proposed revisions should only focus on streamlining the process, not adding new requirements for Councils.

Comments on specific details of the proposed process are included in an attachment. Overall, the Council does not support the proposed rule and would rather operate in partnership with our Regional Office under the existing NEPA and MSA rules and regulations. If you have any questions about our comments, please do not hesitate to contact me.

Sincerely,



John Pappalardo
Chairman

attachment

New England Fishery Management Council Comments on Specific Sections of the Proposed Environmental Review Process for Fishery Management Actions

1. *When initiating analysis of a new action, a FMC or NMFS would be able to quickly determine which level analysis would most likely be applicable to that type of action. However, the determination of significance for a particular action would still ultimately be based on the application of the significance criteria.*

Comment: The New England Fishery Management Council (NEFMC) in consultation with the NMFS Northeast Regional Office already determines the appropriate level of NEPA analysis at the outset of developing a Council action so this provision would not be a change in the process for the NEFMC.

2. *In addition, new § 700.401(d) would authorize the use of a FONSI for an action that may have significant or unknown effects, as long as the significance and effects have been analyzed previously. This provision is intended to address situations such as recurrent annual management measures, the effects of which are significant or unknown, and which therefore do not qualify for a CE, but nevertheless do not require a new EIS every year given the previous analysis.*

Comment: It is not clear whether the Council would have to prepare an EA under these circumstances or could just include a FONSI statement based on the analysis for an earlier action.

3. *The proposed revisions would also establish a new CE category for experimental fishing activities permitted under an EFP, where the fish to be harvested have been accounted for in other analyses of the FMP, such as by factoring a research set-aside into the ABC, OY, or fishing mortality. In addition, the proposed revisions would establish, by regulation, other categories of actions that would qualify for a CE and which currently are currently contained in NOAA's Administrative Order that provides internal agency guidance on administering NEPA (NAO 216-6).*

Comment: It is not clear why CEs currently cannot be issued simply by changing internal review procedures. Experimental fishing activities under which the fish to be harvested have been accounted for in other analyses of the FMP, such as by factoring a research set-aside into the ABC, OY, or fishing mortality should already be given CEs.

4. *§700.3(6) Specifically, this proposal would allow FMCs or NMFS to establish Framework Implementation Procedures (FIPs), i.e., formal mechanisms to allow actions to be undertaken pursuant to a previously planned and constructed management regime without requiring additional NEPA analysis. In its simplest terms, the goal of a FIP is to provide that, when the environmental impacts of fishery management measures have been analyzed in a broad parent document, subsequent actions to implement these measures, e.g., a framework action, annual specifications, or harvest limits, would not need further NEPA analysis, so long as the impacts of a subsequent action fall within the range of effects considered by the broad parent document.*

Comment: This provision should be retained because it could reduce redundant analyses by FMCs. The FMCs still would have to analyze impacts of management actions and adjustments but this provision might minimize the need for describing the affected environment, discussing foreseeable future impacts and cumulative effects for routine adjustments to FMPs where there already has been sufficient analysis of the FMP as a whole.

5. *§700.218 Tiering. NMFS and the FMCs shall tier their environmental documents to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (Section 40 CFR 1508.28). Whenever a broad IFEMS has been prepared (such as for a program, policy or fishery management plan or amendment) and a subsequent IFEMS or environmental assessment is then prepared on an action included within the*

entire program, policy, fishery management plan or plan amendment, the subsequent IFEMS or environmental assessment need only summarize the issues discussed in the broader IFEMS, incorporate discussions from the broader IFEMS by reference, and shall concentrate on the issues specific to the subsequent action.

§700.219 Incorporation by reference. NMFS and the FMCs shall incorporate material into an IFEMS by reference when the effect will be to reduce the length or complexity of the IFEMS without impeding agency and public review of the action.

Comment: Tiering and incorporation by reference already may be used under current NEPA guidelines. The proposed rule should explain whether the requirements for using the provisions are any different under these guidelines and if so, how.

6. *§700.220 Incomplete or unavailable information. (a) NMFS or the FMC shall identify incomplete information that is relevant to reasonably foreseeable significant adverse impacts and that is essential to a reasoned choice among alternatives and determine the overall costs and benefits of obtaining it. If NMFS finds that the overall costs, including the costs of delay of obtaining the information are not exorbitant, NMFS shall ensure that the information is obtained and include the information in the IFEMS.*

Comment: The NEFMC strongly opposes this provision. It would add a burden by requiring the FMCs or NMFS to estimate the cost of obtaining incomplete information rather than simply using available information. This is an addition to current to NEPA requirements although there has been no change in NEPA and the rationale for adding this requirement relates more to MSA requirements than NEPA concerns. If there is a reason for this requirement under the MSA, it should not be added to guidance on meeting NEPA requirements.

7. *§700.401 Determining the Significance of NMFS's Actions.*

Comment: The proposed rule does not clearly explain the need for changing the current criteria for determining the significance of a proposed action. Any additional criteria are likely to increase the burden of meeting NEPA requirements.

8. *NMFS, working with the FMCs, will develop guidance on the appropriate format and content for scoping notices.*

Comment: Developing scoping documents and conducting scoping hearings has not been a major problem for the NEFMC and we therefore see no need to change the current scoping process or interpretation of NEPA scoping requirements.

9. *The draft IFEMS would be circulated for public comment for at least 45 days prior to the FMC voting to recommend an action to NMFS, unless any of the considerations in §700.604(b)(2) are met. The FMC would be required to consider public comment on the IFEMS prior to voting to recommend the action.*

Under the proposed rule, the allowable public comment period on a draft IFEMS might, in extraordinary circumstances, be only 14 days, compared to CEQ's required minimum time period of 45 days for public comment on draft EISs (DEISs). It is important to note, however, that the draft IFEMS informs the FMCs in their development of recommended management measures and actions. In light of the unique role the FMCs play, the draft IFEMS would be specifically designed to link NEPA's considerations to the FMC process of developing recommended management measures and actions under the MSA.

Comment: These paragraphs are confusing and need to be clarified. If the draft IFEMS must be circulated for public comment for at least 45 days prior to the FMC voting to recommend an action to NMFS, there seems little benefit in having a 14-day comment period. The comment period could start when the draft IFEMS is circulated and the FMC could meet shortly after the close of a 45-day comment period, allowing more time for public comments.

10. *Page 2008 3. Public Comment. In order to ensure that the public has a meaningful opportunity to participate in the NEPA process as the FMC develops its recommended management measures and actions, as well as ensure that the FMC is well-informed when making its MSA recommendations, the FMC would be required to consider public comment on the draft IFEMS prior to voting to make a final recommendation to the Secretary. Because FMC meetings are public meetings and transcripts are kept, there would be a record of how the FMC addresses comments. The FMC's vote would also provide evidence of how the FMC responded to comments.*

Comment: It is not feasible for the FMCs to address all public comments during a Council meeting. Although Council meetings are public meetings, they primarily are decision making meeting rather comment and response forums. This would create an additional and unnecessary burden for FMCs.

11. *The proposed regulations state that NMFS is not obligated to respond to comments relevant to the draft IFEMS that are raised for the first time during Secretarial review. (See section 700.304(d)). The proposed regulations are intended to encourage the public to seek any change in the policy recommendation or alternatives considered before the FMC's vote when this can and should appropriately be done via the FMC process.*

Comment: The NEFMC supports this provision because it ensures that FMCs hear all concerns before making final decisions and upholds the integrity of the FMC management process.

12. *§700.702 Categorical Exclusions. (a) The following categories of actions, as found by NOAA in consultation with CEQ for conformity with NEPA and CEQ implementing regulations, normally do not require either an environmental impact statement or an environmental assessment and constitute categorical exclusions: (1) Ongoing or recurring fisheries actions of a routine administrative nature when the action will not have any impacts not already assessed or NMFS finds they do not have the potential to pose significant effects to the quality of the human environment (apart from those already described in an environmental document) such as: reallocations of yield within the scope of a previously published IFEMS, FMP or fishery regulation, combining management units in related FMP, and extension or change of the period of effectiveness of an FMP or regulation; (2) Minor technical additions, corrections, or changes to a Fishery Management Plan or IFEMS; and (3) Research activities permitted under an EFP or Letter of Authorization where the fish to be harvested have been accounted for in other analyses of the FMP, such as by factoring a research set-aside into the ABC, OY, or fishing mortality.*

Comment: The NEFMC strongly supports this provision because it eliminates unnecessary process and analyses which are a waste of valuable FMC resources.

13. *§700.702 (c) Extraordinary Circumstances for Categorical Exclusions. NOAA and NMFS may develop guidance on how NMFS will determine whether extraordinary circumstances exist such that an action that normally qualifies for a categorical exclusion requires the preparation of an EA or IFEMS.*

Comment: The guidelines should provide an example of when this provision might apply. Not enough information is provided for an informed comment.